In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1259

BARTHOLOMEW MANDEL AND HARRY THOMAS, PETITIONERS

v.

JOSEPH O. NOUSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

1. In these cases, consolidated on appeal, petitioners individually brought actions against various Army officials alleged to have libeled them, to have discharged them from government employment according to an illegal employee performance rating plan, and unlawfully to have denied them a pre-termination hearing. Damages and injunctive and declaratory relief were asked. The two district courts granted defendants summary judgment on the libel claim, finding them clothed with official immunity, and dismissed the equitable claims on the grounds that petitioners had failed to exhaust administrative remedies and were not entitled to a pre-termination hearing (Pet. App. B1-C10). The Sixth Circuit affirmed *per curiam* (Pet. App. A1-A5).

The decision of the court of appeals was correct and the case presents no issue warranting further review.

2. Petitioners charged their immediate supervisor, defendant Nouse, and his superior, defendant Pieklik, with libeling them by issuing to them 90-day letters warning of their unsatisfactory performance, and by publishing the letters to other personnel at their place of employment. On the basis of affidavits from both Nouse and Pieklik the district courts found, and the court of appeals agreed, that all actions taken by them in connection with the discharge of petitioners were within the bounds of their official duties.

Nouse's affidavit stated that the 90-day warning letter was issued pursuant to 5 U.S.C. 4304 in the course of his official, statutorily prescribed duty—see 5 U.S.C. 4302-4303—to evaluate petitioners' performance; that the letter was disclosed solely through official channels to those required to see it; that no disclosure outside official channels was made; and that all his actions were taken within the scope of his official duties pursuant to Army policy (see Pet. App. B7-B8, C5). General Pieklik's affidavit stated that he was Nouse's commanding officer; that Nouse was officially authorized to evaluate petitioners' work performances and, if they were found unsatisfactory, to issue 90-day warning letters; that Nouse was required to coordinate and obtain concurrence with the 90-day warning letter from the Civilian Personnel Office and Nouse's superiors; and that to the best of his knowledge the only communication of the contents of the letter was through the official chain of command (see Pet. App. B5-B6, C5). Petitioners filed no affidavits to the contrary.[1]

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[1]Summary judgment was therefore appropriate, contrary to petitioners' assertion that facts alleged in their complaints raised triable issues, see Rule 56, Federal Rules of Civil Procedure (on motion for summary judgment supported by affidavits "an adverse party may not rest upon the mere allegations or denials of his pleading * * *").

The lower courts correctly held that respondents are covered by official immunity from suit for libel. See *Barr* v. *Matteo*, 360 U.S. 564. The appraisal of petitioners' performances, and the subsequent processing of that appraisal according to applicable agency regulations, was "an appropriate exercise of the discretion which" the defendants herein "must possess if the public service is to function effectively." *Id.* at 575; see also, *Howard* v. *Lyons*, 360 U.S. 593, 597-598. Allegations as to defendants' bad faith do not destroy the privilege. *Barr*, *supra*.

Petitioners' reliance on *Scheuer* v. *Rhodes*, 416 U.S. 232, an action brought in part pursuant to 42 U.S.C. 1983, is misplaced: nothing in that decision undermines the continuing validity of *Barr* v. *Matteo* in civil damage actions against federal officers for defamation. See 416 U.S. at 242, 247.

3. Petitioners have not availed themselves of their right to appeal their discharge either to their agency, see 5 C.F.R. 711.205, or to the Civil Service Commission, see 5 C.F.R. 752.203. The courts below thus correctly dismissed their claims for equitable relief for failure to exhaust administrative remedies. *McKart* v. *United States*, 395 U.S. 185; *Myers* v. *Bethelehem Shipbuilding Corp.*, 303 U.S. 41. Moreover, the Civil Service Commission is charged by statute with reviewing employee performance rating plans such as the one here challenged by petitioners, 5 U.S.C. 4306, and dismissal in light of the Commission's primary jurisdiction was accordingly also proper. *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59.

4. A post-termination hearing before the agency or the Civil Service Commission was available to petitioners pursuant to 5 C.F.R. Parts 771B and 772; they were not entitled to a pre-termination hearing. *Arnett* v. *Kennedy*, 416 U.S. 134.

5. There is no conflict between the court of appeals' holding in this case and *Fitzgerald* v. *Hampton*, 467 F.2d 755 (C.A. D.C.). There the court held that the Civil Service Commission's refusal to grant the plaintiff a hearing open to the public and the press "created an infirmity in the hearing which is a fundamental requirement of due process." *Id.* at 769. In the instant case no claim is made that a public hearing is being denied petitioners; nor does any other fundamental due process infirmity justify bypass of the administrative process.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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